No. 71-858

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E. ROBERT SEAVER, CLE

In the

Supreme Court of the United States

OCTOBER TERM, 1971

THOMAS RICCI,

Petitioner,

vs.

CHICAGO MERCANTILE EXCHANGE, an Illinois not-for-profit corporation, EVERETTE B. HARRIS, WILLIAM PHELAN, LEO MELAMED, THE SIEGEL TRADING COMPANY, a corporation, and JOSEPH SIEGEL,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals correctly stay proceedings pending determination of certain issues by the Commodity Exchange Commission.

STATEMENT OF THE CASE

A. Nature and Course of Proceedings

On May 14, 1969, plaintiff filed a six count complaint against the Chicago Mercantile Exchange ("CME"), three

of its officers ("Exchange defendants") and The Siegel Trading Company and its president Joseph E. Siegel (collectively "Siegel"). Counts I, III and V[1] charge that Siegel induced the CME to transfer plaintiff's CME membership to a third party and that in effecting such transfer, the CME failed to enforce and obey its own rules "relating as to membership, financial structure and policing of its members" and the "rules and regulations of the Commodity Exchange Act . . . ." (Compl. ¶ 19) Plaintiff also alleges that the transfer of his membership resulted from a conspiracy between the CME and Siegel. For relief, plaintiff sought avoidance of the transfer of his membership and certain damages.

The CME and its officers moved to dismiss; however, before the motion was heard, discovery was pursued including two depositions of plaintiff[2] and one of defendant Melamed. Briefly, the facts as admitted by plaintiff and as presented to the district court in support of the CME's motion were:

In May of 1967, Siegel purchased an Exchange membership for $15,000 and registered it in plaintiff's name. Plaintiff, who was then Siegel's employee, claims that the $15,000 was lent to him but admits that he never had possession of the funds, that he did not participate in the purchase and that he was not required to give evidence of or secure the debt (II Ricci 17-21).

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[1] Counts II, IV and VI charge tortious interference with advantageous commercial relationships and were before the district court on a claim of pendent jurisdiction.

[2] On June 19, 1969, the Exchange defendants took plaintiff's deposition (cited herein as "I Ricci"). On July 24 and August 1, 1969, Siegel took plaintiff's deposition (respectively cited herein as "II Ricci" and "III Ricci"). The transcripts are part of the Record on Appeal.

On October 24, 1967, plaintiff signed and gave to Siegel an Authorization in the following form (I Ricci 16, Ricci Dep. Ex. 1):

> *"Authorization to Transfer Membership*
>
> To the President of the
> Chicago Mercantile Exchange
>
> I hereby authorize you to transfer my membership in the Chicago Mercantile Exchange to ..... upon receipt from him of the purchase price of $....., which is to be paid to THE SIEGEL TRADING CO., INC. in accordance with Rule 307.
>
> It is understood that the purchaser shall pay the transfer fee and that I shall pay all dues and assessments up to the end of the six-month period in [sic] my membership is sold.
>
> /s/ Thomas Ricci
>
> Date *Oct. 24, 1967*"

A controversy arose between plaintiff and Siegel (II Ricci 44, 54-57) and, on February 11, 1969, an attorney attempted to revoke plaintiff's Authorization (Pl. Ex. 1).

On February 17, 1969, plaintiff and Siegel appeared before the CME's Board of Governors to resolve the disputed claims to the membership (I Ricci 45). The Board suggested arbitration (I Ricci 47). Both agreed to arbitration under CME rules [3] but on February 24, 1969, plaintiff repudiated his agreement to arbitrate (I Ricci 71-73; Ricci Dep. Exs. 3, 8).

Subsequently, Siegel presented plaintiff's Authorization to Transfer Membership and demanded transfer. The CME acted on such Authorization but *simultaneously* approved

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[3] CME Rules 500 through 512 adopted in 1963, as amended, governed arbitration between members.

a transfer of another membership to plaintiff. There was no gap in plaintiff's membership (I Ricci 61-62; II Ricci 105; III Ricci 61).

The district court ruled in favor of the CME, failing, however, to indicate whether the submission of matter outside the pleadings by both sides converted the motion to dismiss into a motion for summary judgment under Federal Rule of Civil Procedure 56.

The Court of Appeals ruled that the motion had not been treated as a motion for summary judgment and reversed with directions to stay proceedings "until such time as the Commodity Exchange Commission . . . may act upon it."

B. Facts Pertinent to The Commodity Exchange Commission's Primary Jurisdiction

The CME is a "board of trade" as defined in Section 2(a) of the Commodity Exchange Act ("Act" or "C.E.A."), U.S.C. § 1 *et seq.* It has been designated by the Secretary of Agriculture as a "contract market." Such designation is a prerequisite to futures trading.

As conditions for designation and continued operation as a contract market, the CME is required to:

> "Enforce all . . . rules . . . made or issued by it . . . which relate to terms and conditions in contracts of sale to be executed on or subject to the rules of such contract market or relate to other *trading requirements*, and which have not been disapproved by the Secretary of Agriculture . . .;" (C.E.A. § 5a(8)) (emphasis supplied)
>
> "Enforce all . . . rules . . . which provide minimum financial standards and related reporting requirements . . . ." (C.E.A. § 5a(9))

Regulatory control of the CME and its members has been delegated by Congress to the Secretary of Agriculture and to the Commodity Exchange Commission ("CEC" or "Commission"), consisting of the Secretary of Agriculture, the Secretary of Commerce and the Attorney General. More particularly, section 6(a) grants jurisdiction to the Commission to insure that the CME complies with its duty of self regulation:

> "The Commission is authorized to suspend for a period not to exceed six months or to revoke the designation of any board of trade as a 'contract market' upon a showing that such board of trade is not enforcing or has not enforced its rules of government made a condition of its designation as set forth in section 5 of this Act or that such board of trade, or any director, officer, agent, or employee thereof, otherwise is violating or has violated any of the provisions of this Act or any of the rules, regulations, or orders of the Secretary of Agriculture or the Commission thereunder."

In addition, the Commission is empowered to issue cease and desist orders against a contract market directing that it obviate any failure to enforce its rules of government or any violation of the Act. (C.E.A. § 6b)

Suspension, revocation and cease and desist proceedings are subject to judicial review by the appellate court for the circuit in which the contract market has its principal place of business. (C.E.A. § 6(a))

The Commission is authorized to report certain violations of the Act for criminal prosecution and is also given the concomitant power to refuse "to report minor violations of the Act for prosecution, whenever it appears that the public interest does not require such action." (C.E.A. § 13(b))

ARGUMENT

I.

PETITIONER'S "JUSTIFICATION" FOR THE GRANT OF THE WRIT IS BASED ON A MISCONCEPTION OF THE OPINION BELOW

Petitioner's principal contention in support of his application is that the decision below "placed an important area of the national economy (*i.e.*, agriculture commodities) outside the scope of effective antitrust enforcement." Obviously, the petitioner misconstrues the holding and effect of the opinion. The Court of Appeals did not hold that the Commission had exclusive jurisdiction or that commodity exchanges were exempt from the antitrust laws.

Instead, the Court of Appeals held that petitioner must, in the first instance, bring his charges that the CME refused to enforce or violated its own rules and the provisions of the Commodity Exchange Act to the attention of the CEC.

II.

EXERCISE OF JURISDICTION BY THE CEC WILL MATERIALLY AID ULTIMATE JUDICIAL RESOLUTION OF ISSUES WITHIN THE CEC'S SPHERE OF CONTINUING RESPONSIBILITY AND EXPERTISE.

Broadly, plaintiff alleged that Siegel and the Exchange defendants conspired to deprive plaintiff of his membership in and trading privileges on the CME. The particulars of plaintiff's charge are that the CME violated or refused to enforce its rules relating to transfers of memberships, qualifications to trade, fees and financial requirements. In addition, the Exchange defendants allegedly honored plain-

tiff's signed Authorization to Transfer Membership in the face of a purported revocation.

The touchstone of the Court of Appeals' opinion was that the lawfulness of the Exchange's conduct must be judged in light of "any justification from the Exchange's status as a board of trade and a designated 'contract market.'" The *justification* issue obviously depends on whether the CME here acted pursuant to lawfully adopted rules (which the Act requires be enforced) or whether, in the absence of relevant rules, it acted in a manner both necessary and proper to comply with and achieve the goals of the Act.

Plaintiff's mere assertion of a conspiracy between the CME and Siegel is without relevance to the issue of the CEC's primary jurisdiction. The conduct characterized by plaintiff as a conspiracy is characterized by the CME as an investigation for the purpose of enforcing its rules. The question whether an unlawful conspiracy occurred is simply another issue properly submitted to the CEC.

The only question decided by the Court of Appeals was whether the initial determination of justification under the Act ought to be made by a federal district court or by the CEC, subject to judicial review as explicitly set forth at section 6(a) of the Act. Precedent and logic firmly support the Court of Appeals' conclusion that the initial findings ought to be made by the CEC.

A. Compliance with Rules and Regulations.

The administration of the Commodity Exchange Act largely depends on the delegation to the various contract markets of the day-to-day supervision and control of commodity traders and commodity trading. Delegation of au-

thority to and consequent self regulation by commodity exchanges is clearly in accord with the congressional purpose expressed in and underlying the Act.

For example, as a condition of its designation as a contract market, the CME was required to adopt and enforce rules regulating the financial stability and qualifications to trade of its members. Failure to enforce such rules subjects the CME to revocation of its designation, injunctions and criminal fines and penalties. Subject to judicial review by the Court of Appeals for the Seventh Circuit, the CEC is granted jurisdiction to insure enforcement of the CME's rules and compliance with the Act (C. E. A. §§ 6(a), 6b)

In this instance, the CEC would first determine whether the rules that the CME relies upon to justify its actions were properly and validly adopted. Next, the CEC would determine whether such rules were enforced in accordance with their own terms and, more importantly, enforced so as to further the goals of the Act. If both determinations were positive, then its factual decisions would be final, subject to review by the Court of Appeals on the ground that such findings were "unsupported by the weight of evidence."

As was said by the court in *Minneapolis Grain Exchange* v. *Farmers Union Grain Terminal Ass'n*, 75 F. Supp. 577, 581-582 (D. Minn. 1947):

> "Congress has already indicated that the Commodity Exchange Commission not only must approve plaintiff's rules, but should have jurisdiction over enforcement of its rules. . . . In the case at bar, factual matters apparently would have to be tried by this Court in order to determine whether the defendants have violated plaintiff's rules, and matters which may vitally affect the uniformity of the policy of the Commission in that regard may be involved. The intervention of this

Court in assuming jurisdiction may give rise to an unfortunate conflict between the rulings of this Court on factual questions and those made by an administrative agency which is expressly clothed by Congress with jurisdiction to determine such a controversy."

B. Other CME Activities.

Plaintiff alleges, in addition to the foregoing rule violations, that the CME refused to accept a purported revocation of plaintiff's signed Authorization to Transfer Membership and instead transferred plaintiff's membership on presentation of such Authorization. In this, the CME was acting in an area, the regulation of "trading requirements," necessarily delegated to it under the Act. For present purposes, it may be assumed that no CME rule explicitly governed this rather unusual situation.

The CME's dilemma is apparent. By reason of the statutory and regulatory scheme, it was required to take responsibility for determining the ownership of one of its memberships. No rule resolved the dispute and the CME was forced to make an *ad hoc* determination.

The question is whether that *ad hoc* determination was justified by the statutory and regulatory scheme under which the CME operated and whether, therefore, the CME ought to be excused from civil liability. The determination of justification demands a comprehensive overview of the statutory purposes served by the delegation of authority to exchanges and of the probable future effect of approval or disapproval of the CME's action on the relations between exchanges and their members. The CEC is obviously more qualified than a district court to judge the CME's actions, especially in light of the necessity of harmonizing the prospective effects of such judgment with the ongoing administration of the Commodity Exchange Act.

III.

RESPONSE TO PLAINTIFF'S ARGUMENTS

Plaintiff puts forth six arguments against the invocation of the doctrine of primary jurisdiction.

A. Pervasive Regulatory Scheme.

Plaintiff argues that the scheme of regulation is not "pervasive" and therefore that the court need not defer to the agency's jurisdiction. Plaintiff is wrong, both on his facts and on his law.

On the facts, the regulatory scheme of the Commodity Exchange Act, insofar as it relates to exchange rules and their enforcement, meets every definitional test for pervasiveness. Regulation starts at the moment a commodity exchange seeks designation as a contract market and continues so long as the designation is not revoked. The CME submitted all rules and amendments to the Secretary of Agriculture subject to his disapproval (§ 8a(7)). All subsequent enforcement proceedings were reported to the Secretary and records of them maintained on file for inspection (§ 5a(1), (2)).

The cases cited by plaintiff to demonstrate the lack of pervasiveness here are wholly inapposite. *United States* v. *Radio Corporation of America,* 358 U.S. 334 (1959) and *McKeon Construction Co.* v. *McClatchy Newspapers,* 1970 CCH Trade Cases ¶ 73,212 (N.D. Cal. 1969) relate to the issue of repeal by implications of the antitrust laws and not primary jurisdiction, as is eloquently clear from the fact that in both cases the administrative agency had passed on the matters in suit prior to judicial action.

In *California* v. *Federal Power Commission,* 369 U.S. 482 (1962), hearings before the FPC were stayed to allow judi-

cial action to proceed on the ground that the administrative action would be futile if the court disallowed a merger. In this case there is no similar question of administrative futility since the issue of justification may properly be decided by the CEC.

The court in *Denver Union Stockyards Co.* v. *Denver Live Stock Commission Co.*, 404 F.2d 1055 (10th Cir. 1968), *cert. denied*, 394 U.S. 1014 (1969), refused to stay a federal antitrust action relating to the industry regulated by the Packers and Stockyards Act, 7 U.S.C. § 181 et seq. The complaint there charged monopolization in violation of section 2 of the Sherman Act and acquisition in violation of section 7 of the Clayton Act. The court found:

> "Nothing in the Packers and Stockyards Act immunizes or exempts those subject to its provisions from antitrust actions. To the contrary, it provides that nothing contained therein shall 'prevent or interfere with the enforcement of, or the procedure under,' the Sherman Act and the Clayton Act. *The Secretary is given no power over acquisitions and mergers.* Those regulated may abandon their activities without agency approval. In our opinion, the Act is not of the pervasive character which, when found in other acts, has resulted in the invocation of the primary jurisdiction doctrine. The determination of whether the charged antitrust violations have occurred does not require administrative expertise and court action will not impair or interfere with the coherence or uniformity of an intricate administrative program." 404 F.2d at 1059 (emphasis supplied, footnotes omitted).

Obviously that case is no authority here where the administrative agency does have authority to deal with the actual conduct complained of and where the administrative agency has the power to determine whether the CME's rules were justified and properly enforced.

B. Arguable Lawfulness.

Plaintiff urges that the defendants' conduct here was not arguably lawful and that it would, therefore, be fruitless to refer the matter to an administrative agency for the exercise of its primary jurisdiction. Whatever the merit of the principle, it is clearly inapplicable here.

Plaintiff's argument is based on the simplistic notion that the "arguable lawfulness" of defendants' conduct must be judged on the basis of the complaint. The argument is absurd since complaints are routinely drafted to allege illegal conduct without reference to defenses, immunities or justifications.

In order to determine the applicability of the doctrine, one must look more deeply into the record. In this case, one finds that each of the material allegations of the complaint are contradicted by plaintiff's admissions.

C. Immunization.

Plaintiff's bare statement that a case may not be stayed pending the exercise of primary jurisdiction unless the administrative agency to which the matter is referred is empowered to immunize the conduct from the antitrust laws is both unsupported and unsupportable. Instead, the primary jurisdiction doctrine is founded on the need for uniformity, application of administrative skills and the need to avoid the possibility of conflict between the courts and the responsible administrative agency.

D. Uniformity of Policy.

Plaintiff fails to consider that all of the regulated commodity exchanges have been required, as a condition of designation, to adopt rules similar to the CME rules. At

stake here is the uniformity of the enforcement policy that will be pursued by these exchanges. Moreover, even the enforcement policy of a single exchange is threatened if it is subject to varying standards applied by different district courts.

The ultimate determination of whether a commodity exchange has fulfilled its duty in the adoption and enforcement of rules requires striking a delicate balance to create a climate in which commodity exchanges, bearing the burden and responsibility of self regulation, are encouraged to act (unstifled by the threat of constant harassing lawsuits) and yet are not above answering for their derelictions. The CEC, which is charged with maintaining this balance, must have the power to make the initial judgment regarding the adequacy of an exchange's performance since such judgment will necessarily create standards of conduct applicable to all areas in which the exchange is responsible for the regulation of its members' conduct.

For example, in this case, the CEC would make a general determination regarding the duty of an exchange to act in a matter where no specific rule governed, but which was within an area delegated to the supervision of the exchange. Moreover, the CEC's determination would create standards for judging the appropriateness of such action. Such standards would have obvious prospective application and effect.

In the interests of uniformity, such standards ought to be left to the hands of a single responsible agency, the CEC.

E. Power to Grant Relief.

The CEC's inability to grant plaintiff treble damages is no bar to its exercise of primary jurisdiction. First, the

plaintiff seeks an order voiding the transfer of his membership and restoration of that membership to him. The CEC has power to issue such an order if it finds that the CME failed to comply with its rules in effecting the transfer (C.E.A. § 6b).

Second, there is no sound authority limiting the application of the primary jurisdiction doctrine to instances where the agency has power to afford all the relief that might be sought. *Thill Securities Corp.* v. *New York Stock Exchange*, 433 F.2d 264, 278 (7th Cir. 1970) (concurring opinion), *cert. denied*, 28 L. Ed. 2d 532 (1971).

In *S. S. W., Inc.* v. *Air Transport Ass'n.*, 191 F.2d 658 (D.C. Cir. 1951), the court recognized that where plaintiff sought treble damages under the antitrust laws, a remedy unavailable before the CAB, the proper procedure was:

> "We think accommodation of the two statutes and of the remedial provisions thereof can best be accomplished as follows: The District Court should retain jurisdiction of the antitrust suit while appellant seeks his remedies from the Board. This is consistent with General American Tank Car Corp. v. El Dorado Terminal Co., 1940, 308 U. S. 422, 433, 60 St. Ct. 325, 84 L. Ed. 361, in which the Court said, 'When it appeared in the course of the litigation that an administrative problem, committed to the Commission, was involved, the court should have stayed its hand pending the Commission's determination of the lawfulness and reasonableness of the practices under the terms of the Act. There should not be a dismissal, but * * * the cause should be held pending the conclusion of an appropriate administrative proceeding.' The proceedings before the Board will result in a determination by it of the extent of its jurisdiction over the subject matter. In addition, they will produce a record, findings of fact

and conclusions of law as to whether the specific practices complained of are legal or illegal under the Civil Aeronautics Act—all of which will be subject to judicial review under that Act. The District Court, which will meanwhile have retained jurisdiction of the antitrust suit, will have the benefit of these proceedings in determining the issue of antitrust violation. Whatever damages might ultimately be awarded by it would be damages for violation of the antitrust laws, not the Civil Aeronautics Act. Similarly, whatever injunctive relief is ultimately granted by the District Court with regard to matters determined by the Board to fall outside its jurisdiction would be under the antitrust laws, not the Civil Aeronautics Act." 191 F.2d at 664. (footnotes omitted.)

F. Agency Expertise.

Plaintiff asserts that the CEC has no useful expertise, but that assertion is based on the assumption that the only question here in issue is whether there was a group boycott.

To the contrary, as recognized by this Court, there are several issues as to which the CEC's expertise is essential. For example: Were the rules relied upon to justify the CME's action lawfully adopted and enforced? Were the CME's actions otherwise consistent with its rules and with the Act? And, did plaintiff comply with all relevant CME rules?

CONCLUSION

For the foregoing reasons, defendants respectfully pray that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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